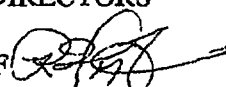
**Department of Energy**

Washington, DC 20585

OCT - 6 1997

MEMORANDUM FOR: **PROCUREMENT DIRECTORS**

FROM: **RICHARD H. HOPF** 
 DEPUTY ASSISTANT SECRETARY FOR
 PROCUREMENT AND ASSISTANCE MANAGEMENT

SUBJECT: **CLARIFICATION OF THE DEPARTMENT OF ENERGY'S**
 POLICY ON TEAMING WITH INDUSTRY THROUGH THE
 WORK FOR OTHERS PROGRAM

On July 30, 1997, I signed a memorandum transmitting a copy of a recent Comptroller General decision, Logicon RDA, B-276240; B-27640.2; B-276240.3, May 23, 1997, 97-1 CPD P219. This decision held that a protester's proposed use of a Federally Funded Research and Development Center (FFRDC) as a subcontractor, "... was contrary to Federal Acquisition Regulation prohibition against FFRDCs competing with private firms under federal government solicitations ..." in light of the proposed substantial participation of the FFRDC in the procurement.

Our office has received a number of requests for further explanation and clarification of the July 30, memorandum. Many of our field offices and contractors have expressed concern about the scope of my memorandum and the Comptroller General decision and specifically are interested in whether the memorandum affects whether our FFRDCs can continue to respond to Broad Agency Announcements (BAAs) submitted by other Federal Agencies.

The purpose of my July 30, 1997, memorandum was to inform Field Offices of the recent Comptroller General decision which generally states that substantial participation of an FFRDC as a proposed subcontractor or team member of an offeror responding to a federal government Request for Proposal (RFP) is contrary to FAR prohibition against FFRDCs competing with the private firms under government solicitations. Each Field Office needs to be aware of this issue to ensure that they properly administer the WFO Program.

To provide clarification of my July 30 memorandum, let me first review the applicable laws, regulations and policies affecting these issues. DOE FFRDCs and other major facility contractors primarily perform work for other Federal agencies under the authority of the Economy Act of 1932, as amended (31 U.S.C. 1535), and sections 31, 32, 33 of the Atomic Energy Act of 1954, as amended (42 U.S.C. Sections 2051-2053) which authorizes "... the conduct of research and development and certain training activities for non-DOE entities, provided that private facilities or laboratories are inadequate for that purpose ..."



The use of FFRDCs is governed by Office of Federal Procurement Policy (OFPP) Policy Letter No. 84-1, "Federally Funded Research and Development Centers" as implemented by FAR 35.017. FAR 35.017 provides that an FFRDC may perform work for a non-sponsoring agency when the work is not available from the private sector. Section 35.017-1, requires agencies to include a provision in its policies and procedures or sponsoring agreement with its FFRDCs that prohibits the FFRDCs from "... competing with any non-FFRDC concern in response to a Federal agency request for proposal for other than the operation of an FFRDC."

Subpart 17.5 of the FAR prescribes the "... policies and procedures applicable to interagency acquisitions under the Economy Act" Subsection 17.504 (e) of this subpart requires that a "... non-sponsoring agency shall provide to the sponsoring agency necessary documentation that the requested work would not place the FFRDC in direct competition with the domestic private industry."

DOE Order 481.1 "Work for Others (NON-DEPARTMENT OF ENERGY WORK)" provides Departmental policy for the performance of work for non-DOE entities (including Federal agencies) by DOE and its contractors. The intent of this order is to provide Departmental policy on the performance of work for non-DOE entities consistent with the Atomic Energy Act of 1954, as amended, the Economy Act and its implementing regulations contained in FAR 17.5, and regulations applicable to FFRDCs in FAR 35.017. Section 4(a) 2, of the WFO Order, provides that a determination be made and certified in writing by a DOE Contracting Officer that any proposed work will not place the facility in direct competition with the domestic private sector. Additionally, Section 4(i) of the order states that "DOE or its facility contractors may not respond to federal agency Requests for Proposals(RFPs)."

Clearly, the sum of these prohibitions and restrictions preclude FFRDCs from competing with the private sector. More specifically, current policies prohibiting RFP responses by DOE and its contractors to other federal agency RFPs (see DOE Order 481.1, Section 4(i) Requirements) should apply to all types of arrangements by which the DOE and/or its contractors act as offerors, team members, or subcontractors in the RFP submission and selection process.

The recent ruling of the Comptroller General in Logicon points out that an FFRDC may violate the FAR prohibition of competing with the private sector by responding to an agency RFP when it is a proposed subcontractor to an offeror and its planned performance is substantial. The Comptroller General decision concludes that "... the determination [of] whether an FFRDC is competing with a private firm in violation of the regulation depends upon the impact of its participation on the procurement, from both a technical and cost standpoint. ..." citing Energy Compression Research Corp., B2433650.2, November 18, 1991, 91-2CPD P466 at 5. The GAO obviously believes that to the extent that proposed FFRDC subcontracting contributes to the merits of a proposal, the FFRDC's participation places it in position of competing with the private sector.

The question has been raised whether a FFRDC's response to a BAA, as opposed to an RFP, either directly or as a subcontractor is in conflict with the FAR prohibition of FFRDCs competing with the private sector. In our opinion, as well as that of the Office of General Counsel, the Broad Agency Announcement process differs from that of the RFP process in several ways and our office believes that the ability of DOE and its contractors to respond to these types of solicitations should be continued consistent with current DOE policy delineated in DOE Order 481.1 Section 4 (d) Requirements. The BAA process identified in FAR 35.016, "Broad Agency Announcements" defines these differences. They are: 1) BAAs are general research announcements that are used for the acquisition of basic and applied research ideas to further advance scientific knowledge or understanding rather than focusing on a specific system or hardware solution; 2) evaluations and selections are performed through a peer or scientific review process based on pre-established selection criteria and proposals need not be evaluated against one another (head-to-head competition) as is the case for RFPs; and 3) the primary basis for selection is technical approach, importance to the agency, and funds availability.

Our opinion is supported by the Comptroller General in its decision in Centre Manufacturing Co. Inc., B-255347.2, March 2, 1994, 94-1 CPD P162. The Comptroller General stated that,

"A BAA is a contracting method by which government agencies can acquire basic and applied research. BAAs may be used by agencies to fulfill requirements for scientific study and experimentation directed toward advancing the state of the art or increasing knowledge or understanding rather than focusing on a specific system or hardware solution. Unlike sealed bidding and other negotiated procurement methods, a BAA does not contain a specific statement of work and no formal solicitation is issued. Under a BAA, the agency identifies a broad area of interest within which research may benefit the government, and organizations are then invited to submit their ideas within a specified period of time. The firms that submit proposals are not competing against each other but rather are attempting to demonstrate that their proposed research meets the agency's requirements. Citing Avogadro Energy Sys., B-244106, September 9, 1991, 91-2 CPD P229."

Additionally, it is noted that agencies will frequently solicit responses by FFRDCs in their announcements. Accordingly, in the absence of some contrary opinion, we believe that unless prohibited by the requesting agency, DOE facility contractors may respond to BAAs as either an offeror or as a proposed subcontractor. It is important to note that DOE's current WFO policy also requires that the sponsor agency provide a written non-competition statement for the BAA agreement stating that the proposed work is unique and will not place DOE in direct competition with the private sector.

We have also been questioned as to whether my memorandum, in its specific reference to FFRDCs, was intended to delete or obviate existing WFO policy that for all intents and purposes extends FFRDC restraints and allowances to other DOE contractors. It did not. DOE Order 481.1, "Applicability" clearly states, "the provisions of this order apply to all DOE elements and contractors performing WFO as provided by law or contract and as implemented by the appropriate DOE Contracting Officer or authorized designee." Based on the fact that DOE contractors operating under the WFO program have most (if not all) of their costs reimbursed, and use government facilities, property and financing, it would be unfair for them to directly compete with the private sector. Nothing in my memorandum or the GAO opinion should disturb this policy.